

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES EUSSE, JR.,
CDCR #K-75382,

Plaintiff,

vs.

MARCO VITELA; EVARISTO
DUARTE; MARTIN CARPIO; ROGER
N. NELSON, JR.; G.J. JANDA;
MICHELLE WHITMAN,

Defendants.

Civil No. 13cv0916 BEN (NLS)

ORDER:

- (1) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[ECF No. 8]; and**
- (2) DIRECTING U.S. MARSHAL
TO EFFECT SERVICE OF FIRST
AMENDED COMPLAINT
PURSUANT TO FED. R. CIV. P.
4(c)(3) & 28 U.S.C. § 1915(d)**

I.

PROCEDURAL HISTORY

On April 16, 2013, James Eusse, Jr. ("Plaintiff"), a state inmate currently incarcerated at Calipatria State Prison located in Calipatria, California, and proceeding pro se, filed a civil action pursuant to 42 U.S.C. § 1983. (ECF No. 1.) Plaintiff also filed two Motions to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a). (ECF Nos. 2, 5.) In addition, Plaintiff filed a Motion to Appoint Counsel. (ECF No. 3.)

On July 17, 2013, this Court granted Plaintiff's Motion to Proceed IFP and sua sponte dismissed his Complaint for failing to state a claim. (ECF No. 6.) Plaintiff has now filed a First Amended Complaint ("FAC"), along with a renewed Motion for Appointment of Counsel. (ECF Nos. 7, 8.)

III.

MOTION FOR APPOINTMENT OF COUNSEL

Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

The Court denies Plaintiff's request without prejudice, as neither the interests of justice nor exceptional circumstances warrant appointment of counsel at this time. *Id.*, *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987).

III.

SUA SPONTE SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)

As the Court informed Plaintiff in its previous Order, notwithstanding IFP status or the payment of any partial filing fees, the Court must subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening and order the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a claim upon which relief may be granted, or seeking monetary relief from a defendant immune from

1 such relief.” 28 U.S.C. § 1915(e)(2)(B); *see also Calhoun v. Stahl*, 254 F.3d 845, 845
 2 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to
 3 prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting
 4 that 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte dismiss
 5 an *in forma pauperis* complaint that fails to state a claim).

6 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua
 7 sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130.
 8 However, as amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an
 9 action filed pursuant to the IFP provisions of section 1915 make and rule on its own
 10 motion to dismiss before directing the U.S. Marshal to effect service pursuant to FED. R.
 11 CIV. P. 4(c)(3). *See Calhoun*, 254 F.3d at 845; *Lopez*, 203 F.3d at 1127; *see also*
 12 *McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir. 1997) (stating that sua sponte
 13 screening pursuant to § 1915 should occur “before service of process is made on the
 14 opposing parties”).

15 “[W]hen determining whether a complaint states a claim, a court must accept as
 16 true all allegations of material fact and must construe those facts in the light most
 17 favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also*
 18 *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005); *Barren v. Harrington*, 152 F.3d
 19 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the language of Federal
 20 Rule of Civil Procedure 12(b)(6)”). In addition, the Court has a duty to liberally construe
 21 a pro se’s pleadings, *see Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir.
 22 1988), which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963
 23 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights
 24 complaint, however, the court may not “supply essential elements of claims that were not
 25 initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.
 26 1982).

27 The Court finds that the claims found in Plaintiff’s First Amended Complaint are
 28 sufficiently pleaded to survive the sua sponte screening required by 28 U.S.C. §§

1 1915(e)(2) and 1915A(b). Therefore, the Court will direct U.S. Marshal service on his
 2 behalf. *See Lopez*, 203 F.3d at 1126-27; *see also* 28 U.S.C. § 1915(d) (“The officers of
 3 the court shall issue and serve all process, and perform all duties in [IFP] cases.”); FED.
 4 R. CIV. P. 4(c)(3) (“[T]he court may order that service be made by a United States
 5 marshal or deputy marshal . . . if the plaintiff is authorized to proceed *in forma pauperis*
 6 under 28 U.S.C. § 1915.”). Plaintiff is cautioned, however, that “the sua sponte
 7 screening and dismissal procedure is cumulative of, and not a substitute for, any
 8 subsequent Rule 12(b)(6) motion that [a defendant] may choose to bring.” *Teahan v.
 9 Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

10 **IV.**

11 **CONCLUSION AND ORDER**

12 Good cause appearing, **IT IS HEREBY ORDERED** that:

13 1. Plaintiff’s Motion for Appointment of Counsel (ECF No. 8) is **DENIED**
 14 without prejudice.

15 **IT IS FURTHER ORDERED** that:

16 2. The Clerk shall issue a summons as to Plaintiff’s First Amended Complaint
 17 (ECF No. 7) upon the Defendants and shall forward it to Plaintiff along with a blank U.S.
 18 Marshal Form 285 for each Defendant. In addition, the Clerk shall provide Plaintiff with
 19 a certified copy of this Order and a certified copy of his First Amended Complaint and
 20 the summons for purposes of serving the Defendants. Upon receipt of this “IFP
 21 Package,” Plaintiff is directed to complete the Form 285 as completely and accurately
 22 as possible, and to return it to the United States Marshal according to the instructions
 23 provided by the Clerk in the letter accompanying his IFP package. Thereafter, the U.S.
 24 Marshal shall serve a copy of the Complaint and summons upon the Defendants as
 25 directed by Plaintiff on the USM Form 285. All costs of service shall be advanced by
 26 the United States. *See* 28 U.S.C. § 1915(d); FED. R. CIV. P. 4(c)(3).

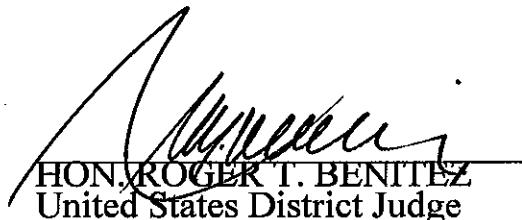
27 3. Defendants are thereafter **ORDERED** to reply to Plaintiff’s First Amended
 28 Complaint within the time provided by the applicable provisions of Federal Rule of Civil

1 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be
2 permitted to “waive the right to reply to any action brought by a prisoner confined in any
3 jail, prison, or other correctional facility under section 1983,” once the Court has
4 conducted its *sua sponte* screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b),
5 and thus, has made a preliminary determination based on the face of the pleading alone
6 that Plaintiff has a “reasonable opportunity to prevail on the merits,” the defendant is
7 required to respond).

8 4. Plaintiff shall serve upon the Defendants or, if appearance has been entered
9 by counsel, upon Defendants’ counsel, a copy of every further pleading or other
10 document submitted for consideration of the Court. Plaintiff shall include with the
11 original paper to be filed with the Clerk of the Court a certificate stating the manner in
12 which a true and correct copy of any document was served on the Defendants, or counsel
13 for Defendants, and the date of service. Any paper received by the Court which has not
14 been filed with the Clerk or which fails to include a Certificate of Service will be
15 disregarded.

16 **IT IS SO ORDERED.**

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18 DATED: Nov 1, 2012



19 HON. ROGER T. BENITEZ
20 United States District Judge

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